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In the Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF MISSOURI, ET AL., PETITIONERS

v.

KALIMA JENKINS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will address the question whether the court of appeals applied the proper legal standards in deciding that court-ordered remedial education programs should not be terminated. We leave to the parties the more narrow, fact-bound question whether the district court abused its discretion in ordering salary increases for non-instructional personnel.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	10
Argument:	
The court of appeals properly approved the continuation of the *Milliken II* programs	13
A. The Court should not consider petitioners' challenge to the propriety of the original remedy	13
B. The court of appeals properly held that the *Milliken II* programs should not be terminated until petitioners show that the educational deficiencies caused by prior segregation have been eliminated to the extent practicable	14
C. The court of appeals properly held that test scores can be relevant in deciding whether the the deficiencies in basic skills caused by prior segregation have been eliminated to the extent practicable	22
Conclusion	27

TABLE OF AUTHORITIES

Cases:

Board of Educ. v. *Dowell*, 498 U.S. 237 (1991)	2, 11, 15, 20, 21, 26
Columbus Bd. of Educ. v. *Penick*, 443 U.S. 449 (1979)	22, 25
Dayton Bd. of Educ. v. *Brinkman*, 442 U.S. 526 (1979)	24-25
Freeman v. *Pitts*, 112 S. Ct. 1430 (1992)	2, 7, 15, 16, 19, 20, 21, 26
Green v. *County Sch. Bd.*, 391 U.S. 430 (1968)	16
International Bhd. of Teamsters v. *United States*, 431 U.S. 324 (1977)	23

Cases—Continuted: Page

Jenkins v. *Missouri*:
593 F. Supp. 1485 (W.D. Mo. 1984) 2, 3, 17, 21
639 F. Supp. 19 (W.D. Mo. 1985) 3, 4, 15, 18, 19, 25
Milliken v. *Bradley*, 433 U.S 267 (1977) 4, 11, 17, 20, 25
Missouri v. *Jenkins*:
490 U.S. 1034 (1989) 7
495 U.S. 33 (1990) 7
Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) 16, 24
Taylor v. *Freeland & Kronz*, 112 S. Ct. 1644 (1992) 14
Yee v. *City of Escondido*, 112 S. Ct. 1522 (1992) 14

Statutes and rule:

Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*:
Tit. IV, 42 U.S.C. 2000c-6 1
Tit. V, 42 U.S.C. 2000d 1
Tit. IX, 42 U.S.C. 2000h-2 1
Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.* 1
Sup. Ct. R. 14.1(a) 14

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INTEREST OF THE UNITED STATES

This case concerns the proper legal standards for deciding when court-ordered remedial education programs should be terminated. The United States has a direct interest in the proper resolution of that question. The United States has responsibility for enforcing school desegregation under Titles IV, VI, and IX of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, 2000d, and 2000h-2, and the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.*, and is a party in several hundred desegregation cases. Consistent with that responsibility, the United States has participated in most of this Court's school desegregation cases, including the

recent cases of *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992), and *Board of Educ.* v. *Dowell*, 498 U.S. 237 (1991).

STATEMENT

1. a. In 1977, the Kansas City, Missouri, School District (KCMSD) and KCMSD students filed suit against the State of Missouri and various state officials (petitioners), several suburban school districts, and several federal agencies. After the district court realigned the KCMSD as a defendant, an amended complaint was filed alleging that the State, the suburban districts, and the federal agencies had caused interdistrict segregation among the school districts in the Kansas City metropolitan area. The amended complaint also alleged that the State and the KCMSD had caused segregation within the KCMSD schools.

In 1984, the district court issued two opinions on liability. In the first opinion, the court found that there was no interdistrict violation committed by the suburban defendants warranting interdistrict relief. J.A. A721-A820. In the second opinion, however, the court found that the State and the KCMSD had caused and had legal responsibility for racial segregation within the KCMSD. *Jenkins* v. *Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984).

The court found that Missouri law required the KCMSD to segregate students on the basis of race before 1954. 593 F. Supp. at 1490. In 1954, the State Attorney General issued an opinion declaring the state statutes requiring segregation unenforceable. However, the State did not repeal its constitutional provision mandating racially segregated schools until 1976. *Ibid.*

The court found that, after 1954, the KCMSD "chose to operate some completely segregated schools and some integrated ones." *Jenkins*, 593 F. Supp. at 1492. At the time of the district court's 1984 decision, 24 schools

remained more than 90% black. *Id.* at 1493. The court found that these overwhelmingly black schools were vestiges of the dual system. *Ibid.*

The court also found that "inferior education indigenous [to] the state-compelled dual school system has lingering effects in the [KCMSD]." *Jenkins*, 593 F. Supp. at 1492. The court noted that "[s]everal witnesses confirmed * * * that forced segregation ruins attitudes" and that "[t]he general attitude of inferiority among blacks produces low achievement." *Ibid.* (citation omitted).

The court rejected the State's argument that it should not be held liable for the segregation in the KCMSD because state law precluded it from requiring the KCMSD to desegregate in the post-1954 period. *Jenkins*, 593 F. Supp. at 1504-1505. The court explained that "[t]he state executive and its agencies as well as the State's General Assembly had and continue to have the constitutional obligation to affirmatively dismantle any system of de jure segregation, root and branch. * * * This case is before this Court simply because the KCMSD and the State have defaulted in their obligation to uphold the Constitution." *Id.* at 1505.

b. The court issued its first remedial order in 1985. 639 F. Supp. 19. In its opinion, the court elaborated on the harm to educational achievement caused by the State's and the KCMSD's failure to eliminate the dual system. The court found that "[s]egregation has caused a system wide *reduction* in student achievement in the schools of the KCMSD." *Id.* at 24. The court cited test results showing that only a few elementary schools in the KCMSD were performing at or above national norms in math and reading. *Ibid.* The court also found that the "education process has been * * * 'bogged down' in the KCMSD by a history of segregated education," and that

"[t]oo often, as a result, a higher percentage of black students are among the lower achievers." *Id.* at 28. The court concluded that its remedy should include educational programs designed to "remedy the ill effects of the unconstitutional segregation and to attract and maintain non-minority enrollment." *Id.* at 24.

Both the State and the KCMSD agreed that the court should order into effect programs "designed to increase student achievement at the elementary and secondary levels." 639 F. Supp. at 25. They also agreed that such programs should include "achieving AAA status,[1] reducing class size at the elementary and secondary level, summer school, full day kindergarten, before and after school tutoring and early childhood development programs." *Id.* at 26. The court adopted those suggestions and several others. *Id.* at 26-32. These student achievement programs are referred to by the parties as *Milliken II* programs because they are the kinds of programs this Court approved in *Milliken* v. *Bradley*, 433 U.S. 267 (1977) (*Milliken II*), to overcome the educational deficiencies caused by racial segregation. In addition to ordering the *Milliken II* programs into effect, the district court also ordered the development of a magnet school program, a program for voluntary interdistrict transfers, and a capital improvements program. 639 F. Supp. at 34-35, 38-41.

c. In 1986, the court of appeals issued a single opinion on liability and remedy. 807 F.2d 657 (en banc). The court upheld the district court's rejection of a mandatory

[1] The Missouri State Department of Elementary and Secondary Education classifies school districts according to the quality of their programs. The highest classification is AAA, which means that the school system "has the resources necessary to provide minimum basic education to its students." 639 F. Supp. at 26.

interdistrict remedy and affirmed the remedies ordered by the district court with several modifications.

The State did not appeal the finding of liability or the remedial imposition of most of the *Milliken II* programs. 807 F.2d at 662, 682-683. The State challenged only the requirements that it pay for the increase in the number of teachers beyond that necessary to achieve AAA status, that it pay for an "effective schools program," that it establish a program for voluntary interdistrict transfers, and that it pay for capital improvements. *Id.* at 683-686. The court of appeals held that the costs for increasing the number of teachers and for the effective schools program should be divided equally between the State and the KCMSD. *Id.* at 684-685. It held that a program of voluntary interdistrict transfers was a valid remedy for the State's violation. *Id.* at 683-684. And it held that capital improvements were necessary for successful desegregation. *Id.* at 685. This Court denied certiorari. 484 U.S. 816 (1987).

2. Between 1986 and 1988, the district court issued a series of additional remedial orders relating to magnet schools, *Milliken II* programs, and capital improvements. The district court also issued an order raising property taxes to assist the KCMSD in funding its share of the remedy. The State appealed from a number of those orders. In 1988, the court of appeals resolved those appeals in a single opinion. 855 F.2d 1295 (1988).

The district court had ordered magnet programs into effect, in part, in an attempt to attract white students from private schools and the suburbs into the KCMSD schools and to retain those white students who were still in the system. The State argued that this goal was unrelated to the violation. The court of appeals rejected that argument, noting that the district court had found that "the existence of segregated schools led to white

flight from the KCMSD to suburban districts and to private schools." 855 F.2d at 1302.

The court also rejected the State's argument that the district court had erred in establishing a goal of improving the education for all students in the KCMSD system. The court held that the district court "did not view improving education for all KCMSD students as an end in itself, but as a means to serve the goals of restoring to the victims the education they have been denied and of attracting and maintaining whites in the KCMSD." 855 F.2d at 1303. The court therefore concluded that the district court did not "abus[e] its discretion in using system-wide educational enhancements to accomplish its legitimate desegregative objectives." *Ibid.*

The court also rejected the State's argument that the capital improvement program exceeded the scope of the State's violation. The court found ample support for the district court's finding that "the State by its constitutional violations and failure to remove the vestiges of the dual school system 'contributed to, if not precipitated, an atmosphere which prevented the KCMSD from raising the necessary funds to maintain its schools.'" 855 F.2d at 1305. The court concluded that the findings "demonstrate a spiraling effect of white children leaving KCMSD schools and KCMSD's white constituency withdrawing its financial support from the system. This process eventually caused the decay of KCMSD's school buildings, which in turn fed the cycle." *Ibid.* The court added that "[e]ven absent the findings that the State contributed to causing the decay, the capital improvements would still be required both to improve the education available to the victims of segregation as well as to attract whites to the schools." *Ibid.*

Finally, the court of appeals affirmed the order requiring an increase in property taxes. The court held, however, that any future orders affecting taxes should permit the KCMSD to impose the tax, with the court's role limited to enjoining any state law that would prevent the tax from taking effect. 855 F.2d at 1308-1315.

This Court granted certiorari on the property tax issue, but denied certiorari on the scope of the remedy. See 490 U.S. 1034 (1989). On the merits of the property tax issue, this Court held that the district court lacked authority to order property tax increases itself. The Court agreed with the court of appeals, however, that the district court could order the KCMSD to set a tax levy and enjoin any state laws that would prevent the tax from taking effect. 495 U.S. 333 (1990).

3. The issues before this Court now arise from two orders issued by the district court in June, 1992. One required funding of the *Milliken II* programs for the 1992-1993 school year. Pet. App. A69-A75. The other approved the KCMSD's proposed schedule for salary increases for the 1992-1993 year. *Id.* at A76-A93. The court of appeals affirmed those orders in November, 1993. *Id.* at A1-A42.

a. Relying on *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992), the State argued in the district court that the *Milliken II* programs had been fully implemented and that this aspect of the KCMSD's operations should therefore be declared unitary. The district court required the funding of those programs, without expressly addressing the State's unitariness argument. Pet. App. A9-A10.

On appeal, the State argued that the district court had erred in failing to address the unitariness issue. The court of appeals held that the district court's approval of the continuation of the programs constituted a rejection of the State's argument and was necessarily based on a

finding that "the goals of the desegregation programs, the elimination of the vestiges of past discrimination to the extent practicable, had not yet been achieved." Pet. App. A10-A11.

The court of appeals then held that the district court did not err in refusing to grant the State's request for a declaration of partial unitariness. The court characterized the State as arguing that because the *Milliken II* programs had been fully implemented, the State was entitled to a declaration of partial unitariness. Pet. App. A14. The court of appeals rejected that argument on the ground that *Freeman* required the State to show that the "vestiges of segregation, here the system-wide reduction in student achievement, have been eliminated to the greatest extent practicable." *Id.* at A20-A21. The court concluded that the "only evidence before the district court with respect to the degree of progress on elimination of vestiges of past discrimination was at best that a start had been made." *Id.* at A19. The court explained that while the State's Assistant Commissioner of Education described how the *Milliken II* programs had been established, he did not indicate whether they had succeeded in improving student achievement. Pet. App. A18. The court also observed that KCMSD's witnesses stated that while the *Milliken II* programs were making progress, more could be achieved. *Ibid.* A18.

The court then provided additional guidance to assist the district court in further proceedings on unitariness. The court stated that "careful factfinding and detailed articulation of findings will be required," that "[t]he success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation," and that "[i]t will take time to remedy the system-wide

reduction in student achievement in the KCMSD schools." Pet. App. A20-A21. The court also noted with approval that the district court had ordered the KCMSD to prepare plans based on the assumption that court-ordered funding would be withdrawn in three to ten years. *Id.* at A13.

b. The court of appeals also affirmed the salary increase order. The court relied upon the district court's finding that such salary increases were necessary to retain the personnel necessary to implement the required quality educational programs and the magnet schools. Pet. App. A23-A24.

4. The Eighth Circuit denied rehearing en banc. Pet. App. A43-A68. Three of the six judges who voted to deny rehearing en banc, including two of the judges from the original panel, explained their reasoning. They stated that the State had misread the panel opinion as holding that student achievement is the sole basis for determining whether the effects of past discrimination have been remedied. The three judges explained that while "test results must be considered," they "must be only one factor in the equation." *Id.* at A48. (Gibson, J., joined by McMillian, J., and Magill, J.).

Five judges dissented from the denial of rehearing en banc. They concluded that "[t]he district court has, with the approbation of the panel, imbedded a student achievement goal measured by annual standardized tests into its test of whether the KCMSD has built a high-quality educational system sufficient to remedy past discrimination" and "[t]he Constitution requires no such standard." Pet. App. A58. The dissenting judges added that while there was "no question that the reduced educational attainment discerned by the district court in 1984 resulted from acts of racial discrimination and represented 'vestiges' of past unlawful segregation,

* * * [t]o require achievement test scores at or above the national norm is to require the school system to be responsible for circumstances beyond its control." *Id.* at A63-A64. The dissenting judges also concluded that the district court's salary order was not tailored to the violation insofar as it required salary increases for non-instructional personnel. *Id.* at A57.

SUMMARY OF ARGUMENT

A. Petitioners sought certiorari on two questions: whether the court of appeals erred in considering test scores in deciding that the *Milliken II* programs should not be terminated, and whether the court of appeals erred in approving salary increases for non-instructional personnel. Most of petitioners' brief, however, is devoted to the very different question of whether the original remedial plan exceeded the scope of the violation. That issue was finally resolved years ago, petitioners did not seek to reopen it below, and it is not fairly included within either of the questions presented. Petitioners' challenge to the original remedy is therefore not properly before this Court.

Petitioners' assertion that their challenge to the remedy should be considered because the orders under review are inextricable products of that remedy is unpersuasive. Petitioners argued in the district court, in the court of appeals, and at the petition stage that the original remedy did not justify either of the orders under review. If petitioners now believe that the only way to attack the orders under review is to attack the original remedy, we suggest that the proper response is not for the Court to review a question on which it did not grant certiorari and which was not raised below. Instead, the Court may wish to consider dismissing the writ of certiorari.

B. The court of appeals properly rejected petitioners' request to terminate their obligation to fund the *Milliken II* programs. This Court's decisions in *Board of Educ.* v. *Dowell*, 498 U.S. 237 (1991), and *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992), establish the framework for resolving that issue. Under *Dowell* and *Freeman*, a party seeking partial termination of a decree must show both that it has complied with the part of the decree it seeks to terminate *and* that the effects of the violation sought to be remedied by that part of the decree have been eliminated to the extent practical. Petitioners made only the first showing. They made no effort to show that the deficiencies in basic educational skills that the *Milliken II* programs were designed to remedy had been eliminated to the extent practical.

Petitioners seek to escape the consequences of their failure by arguing that educational deficiencies can never be viewed as a vestige of a racially segregated school system. That argument is foreclosed by this Court's decision in *Milliken* v. *Bradley*, 433 U.S. 267 (1977). In that case, the Court held that where racial segregation has depressed educational achievement, federal courts may require state and local school officials to implement programs designed to raise the level of student achievement. The district court in this case found that racial segregation had caused just such educational deficiencies and it properly ordered remedial programs designed to correct those deficiencies.

Nor does the passage of time since the *Milliken II* programs were fully implemented establish that there is no link between past segregation and current educational deficiencies. At the time of the district court's decision, the *Milliken II* programs had been fully implemented for three years. In *Milliken II*, the Court noted that curing educational deficiencies caused by

segregation would necessarily take time. It would be inappropriate to presume, without any further factual support, that the educational deficiencies caused by petitioners' lengthy constitutional violation have been fully remedied in three years. In *Dowell* and *Freeman*, where the remedies had been implemented for a much longer period of time, the Court rejected the view that the passage of time alone conclusively established that current conditions were not traceable to prior segregation. Instead, the Court insisted upon a fact-intensive inquiry into that issue.

School desegregation remedies are intended to be temporary and the courts below are aware of that. They have consequently asked the parties to prepare for the elimination of court-ordered funding in three to ten years. This Court should not intervene in that process.

C. The court of appeals did not impose a requirement that student test scores reach a certain level before the *Milliken II* programs could be terminated. Instead, it held that test scores were one relevant factor bearing on that issue. That holding is correct. Since the relevant inquiry is whether a systemwide reduction in achievement attributable to segregation has been remedied to the extent practicable, it would be improper to ignore test scores altogether. The court considered test scores when it found that racial segregation had depressed educational achievement. It is logical that test scores should also be considered in deciding whether that violation has been remedied. Proof that test scores remain substantially behind levels achieved by students who have not been subjected to segregation could be a sign that the deficiencies caused by prior segregation have not, in fact, been remedied to the extent practicable.

Of course, there could be a variety of other explanations for continuing deficiencies in performance by

students who have been subjected to segregation. These include poverty, crime, and lack of parental involvement. Under *Dowell* and *Freeman*, however, petitioners have the burden to show that such factors, rather than segregation, account for continuing deficiencies. Petitioners have not attempted to make such a showing. The mere assertion that factors besides segregation are entirely responsible for current deficiencies is no substitute for proof.

ARGUMENT

THE COURT OF APPEALS CORRECTLY APPROVED THE CONTINUATION OF THE *MILLIKEN II* PROGRAMS

A. The Court Should Not Consider Petitioners' Challenge To The Propriety Of The Original Remedy

In their petition for certiorari, petitioners raised two issues: (1) whether the court of appeals erred in considering test scores in determining that remedial educational programs should not be terminated; and (2) whether the court of appeals erred in approving salary increases for school district employees. Most of petitioners' brief on the merits, however, is directed to a much different question: Whether the original remedial plan imposed by the district court in 1985 exceeded the scope of the constitutional violation. That issue was finally resolved years ago, and this Court has denied certiorari on it two times. Petitioners did not attempt to reopen that issue in either the district court or the court of appeals. Nor is that issue fairly included within either of the questions presented in the certiorari petition.

Except in unusual circumstances, this Court will "not consider questions outside those presented in the

petition for certiorari." *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1532-1533 (1992); *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992); see also Sup. Ct. R. 14.1(a). Because there are no such unusual circumstances here, the Court should not consider petitioners' challenge to the original remedy.

Petitioners candidly admit that they seek to reopen the question of the propriety of the original remedy. Br. 18-19. To justify that request, petitioners contend that the orders at issue here are "inseparable products" of the lower courts' remedy. Br. 27 n.17. As petitioners elsewhere acknowledge, however, "each question can be dealt with on its own terms." Br. 18. And until now, petitioners have done exactly that. In the district court, in the court of appeals, and at the petition stage, petitioners argued that the court's original remedy provided no justification for the orders under review. If petitioners have now come to the conclusion that the only way to attack the current orders is to attack the original remedy, the proper response is not for this Court to review a question that has already been settled, that was not raised below, and on which it did not grant certiorari. Instead, the Court may wish to dismiss the writ of certiorari.

B. The Court Of Appeals Correctly Held That The *Milliken II* Programs Should Not Be Terminated Until Petitioners Show That The Educational Deficiencies Caused By Prior Racial Segregation Have Been Eliminated To The Extent Practicable

Before evaluating petitioners' current arguments concerning the *Milliken II* programs, it is important to begin with an understanding of what the court of appeals actually decided. Petitioners argued below that, because

the *Milliken II* programs had been fully implemented, they were automatically entitled to be relieved of their responsibility to fund those programs. Drawing on this Court's decisions in *Dowell* and *Freeman*, the court of appeals rejected that contention. That holding was correct.

In *Dowell*, this Court held that a desegregation decree may be terminated only upon proof by the party seeking termination that it has "complied in good faith with the desegregation decree since it was entered," *and* that "the vestiges of past discrimination ha[ve] been eliminated to the extent practicable." 498 U.S. at 249-250. In *Freeman*, the Court held that a district court also has discretion to order partial termination of a decree when a party makes similar showings with respect to the part of the decree sought to be terminated. 112 S. Ct. at 1445-1446. Under *Freeman*, the burden of proof is on the party seeking partial termination. If racial segregation has previously been found to have caused a particular condition, the party seeking a declaration of partial unitariness must show that any current manifestation of that condition "is not traceable, in a proximate way, to the prior violation." *Id.* at 1447.

Thus, *Dowell* and *Freeman* establish that a party seeking to terminate part of a decree cannot rest merely on a showing that the party has implemented that part of the decree. Such a party must also show that the effects of the violation sought to be remedied by that part of the decree have been eliminated to the extent practicable. In this case, the *Milliken II* programs that petitioners sought to terminate were designed to remedy a system-wide reduction in achievement attributable to prior unlawful racial segregation. 639 F. Supp. 19 (W.D. Mo. 1985). To obtain the relief they sought, petitioners were required to show initially, not only that the *Milliken II*

programs had been fully implemented, but also that the systemwide reduction in achievement attributable to prior segregation had, as a result, been eliminated to the extent practicable. Because petitioners did not attempt to make that showing, and instead rested solely on a showing that the programs had been implemented, the court of appeals properly refused to terminate the *Milliken II* programs.

1. Petitioners seek to escape the consequences of their failure to meet the burden imposed by *Dowell* and *Freeman* by arguing (Br. 28-30) that the systemwide reduction in achievement found by the district court cannot be viewed as a vestige of segregation because it is not one of the six facets of school operations set forth in *Green* v. *County Sch. Bd.*, 391 U.S. 430 (1968). In *Green*, the Court held that vestiges of segregation may be found to exist in student assignment, faculty, staff, transportation, extracurricular activities, and facilities. *Id.* at 435. Neither *Green* nor any other decision, however, suggests that this list was intended to be exclusive. In *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971), this Court characterized the *Green* factors as "among the most important indicia of a segregated system," not as the only indicia. In *Freeman*, the Court noted that the district court had considered impaired quality of education as one vestige of segregation. 112 S. Ct. at 1446. While the correctness of that aspect of the district court's decision was not at issue, the Court commented that the district court's approach "illustrates that the *Green* factors need not be a rigid framework." 112 S. Ct. at 1446-1447.

More fundamentally, petitioners' argument that a reduction in student achievement cannot be a vestige of segregation is foreclosed by this Court's decision in *Milliken II*. In that case, the Court upheld a district

court order requiring compensatory education programs to remedy deficiencies in basic skills caused by segregation. The Court explicitly rejected the argument that, because "the constitutional violation found by the District Court was the unlawful segregation of students on the basis of race, the court's decree must be limited to remedying unlawful pupil assignments." 433 U.S. at 281. The Court explained that a remedy may seek to eliminate not only a condition that itself violates the Constitution, but also harms that "flow from such a violation." *Id.* at 282. Because the segregated system had caused minority school children to suffer significant deficiencies in basic educational skills, the Court held that the remedial educational programs were properly tailored to cure a condition resulting from the violation. *Id.* at 290.

Milliken II thus squarely holds that educational deficiencies caused by segregation constitute a vestige of a segregated school system that a court may properly seek to eliminate. Despite petitioners' assertions to the contrary (Br. 41), acceptance of their argument that educational deficiencies cannot be a vestige of a segregated school system would require this Court to overrule *Milliken II*.

2. Petitioners contend (Br. 21) that the district court never made a finding tying educational deficiencies to racially identifiable schools. That contention is incorrect.

In its initial liability decision, the court expressly found that the "inferior education indigenous [to] the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District." 593 F. Supp. at 1492. The court specifically relied on testimony that "forced segregation ruins attitudes" and that the "general attitude of inferiority among blacks produces

low achievement." *Ibid.* (citation omitted). In its remedial order, the court elaborated that "[s]egregation has caused a system wide *reduction* in student achievement in the schools of the KCMSD." 639 F. Supp. at 24. The court further found that the "education process has been * * * 'bogged down' in the KCMSD by a history of segregated education," and that "[t]oo often, as a result, a higher percentage of black students are among the lower achievers." *Id.* at 28. In recognition of this fact, petitioners themselves "proposed program components designed to increase student achievement at the elementary and secondary levels" (*id.* at 25), including most of the programs ultimately ordered into effect by the district court (*id.* at 26). Thus, as even the judges dissenting from the denial of rehearing en banc in this case stated, "[t]here is no question that the reduced educational attainment discerned by the district court in 1984 resulted from acts of racial discrimination and represented 'vestiges' of past unlawful segregation." Pet. App. A63.

3. Petitioners argue (Br. 27-32, 40) that the *Milliken II* programs exceeded the scope of the violation because they were designed to attract white students from the suburbs to the KCMSD schools and that purpose is incompatible with the district court's earlier finding that there was no interdistrict violation. As the findings discussed above demonstrate, however, the principal purpose of the *Milliken II* programs was not to attract white students from the suburbs, but, as their name implies, to remedy the effect that racial segregation has had on student achievement. 639 F. Supp. at 24-34. The

Milliken II programs are fully justified as a remedy for that violation.[2]

4. Petitioners contend (Br. 35) that the passage of time since the time of the violation shows that there is no causal link between prior segregation and current deficiencies in academic achievement. This Court noted in *Freeman* that "with the passage of time the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish." 112 S. Ct. at 1446. The same is true of educational deficiencies. The longer that remedial educational programs are in place, the less likely it is that any remaining achievement deficiencies can be traced to segregation. But that common sense proposition does not justify a conclusive presumption that, because a certain period of time has passed, the link between prior segregation and current educational deficits must have been broken.

Nothing in *Freeman* supports such a conclusion. To the contrary, that decision points in exactly the opposite direction. In *Freeman*, one issue was whether existing residential segregation could be attributed to prior school segregation, thereby warranting further remedial student assignments. Although the student assignment remedy in *Freeman* had been in effect for 17 years, the Court did not rely on a conclusive presumption that,

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[2] In ordering the *Milliken II* programs into effect, the district court also found that they would help to attract suburban and private school students to the KCMSD schools and to retain white students who remained in the system. 639 F. Supp. at 24-34. Those goals were justified by the district court's finding that *de jure* segregation in the KCMSD caused white students to leave the system. 855 F.2d at 1302. That finding is not inconsistent with the district court's earlier conclusion that the suburban districts did nothing to cause this white flight and therefore could not be included in a mandatory interdistrict remedy.

because of the passage of time alone, residential segregation could not be traced to prior school segregation. Instead, the Court noted that the district court had "examined the interaction between [the school system] policy and demographic shifts" and had found on the basis of that examination that current residential segregation was caused by factors factually unrelated to past school segregation. 112 S. Ct. at 1439, 1447.

The Court applied that same fact-intensive approach in *Dowell*. There, the school board sought a declaration of unitary status to permit the termination of a busing remedy and a return to neighborhood schools. The Court noted that one issue bearing on whether such relief should be granted was whether continuing residential segregation was the product of past school segregation or was instead the result of recent private decision-making and economics. 498 U.S. at 250 n.2. Although the school district had complied with the desegregation plan for 13 years, the Court made no assumptions about the proper resolution of that issue based on the passage of time or the school district's compliance. Instead, the Court remanded the case to the lower courts for a finding on whether residential segregation was, in fact, still a vestige of prior segregation. *Ibid.*

A conclusive presumption that the passage of time alone has eliminated the effects that segregation has had on student achievement is equally inappropriate. In *Milliken II*, this Court recognized that compensatory programs cannot be expected "to wipe the slate clean by one bold stroke." 433 U.S. at 290. Because segregation can cause serious deficiencies in basic skills, remedying those deficiencies can "require time, patience, and the skill of specially trained teachers." *Ibid.* At the time of the district court's decision in this case, the *Milliken II* programs have been completely in place for three years.

Pet. 12. It would be inappropriate to assume, without any specific factual support, that serious educational deficiencies caused by children having been educated in a segregated environment have been fully remedied in that time.

This does not mean that the programs at issue here should go on forever. Remedies in school desegregation cases are temporary. *Dowell*, 498 U.S. at 247. The "ultimate objective [is] to return school districts to the control of local authorities." *Freeman*, 112 S. Ct. at 1445. The courts below are fully aware of that. The district court has already asked the parties to submit proposals for the elimination of court-ordered funding after three, five, seven, or ten years. The court of appeals has expressly approved that time-limited approach. Pet. App. A12-A13. The lower courts are "looking forward to the day when a gradual phase-out would be considered." *Id.* at A13.

5. Petitioners contend (Br. 36, 42) that their responsibilities should be terminated now because their involvement in segregation in Kansas City was limited to actions taken by them before 1954, when segregation was mandated by state law. Accordingly, petitioners contend, the students in the system today could not have suffered from any constitutional violation committed by them.

The district court did not, however, premise petitioners' liability entirely on the pre-1954 state statute mandating segregated schools. The court also relied on the fact that petitioners had taken no action since 1954 to eliminate the vestiges of segregation in the KCMSD. 593 F. Supp. at 1504-1505. Petitioners' failure to fulfill their affirmative constitutional duty to "take whatever steps might be necessary to convert [the KCMSD] to a unitary system * * * continue[d] the

violation of the Fourteenth Amendment." *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 459 (1979).

That additional post-1954 basis for liability is significant. The district court found in 1984 that, because petitioners had failed to take steps to eliminate the dual system, black children continued to attend one-race schools and continued to suffer educational harm through 1984. 593 F. Supp. at 1492-1493, 1504-1505. Students harmed by that violation remain in the school system today.

Nor did the effects of petitioners' violation end even in 1984. The magnet school program ordered by the district court as a means to desegregate the one-race schools was not fully implemented until 1994. Many students thus continued to attend one-race schools that were vestiges of the State's violations. And the district court recently found that the magnet program has still not eliminated segregated schooling to the extent practicable. Pet. App. A129-A132. Thus, according to the district court's unchallenged findings, students in the system today have been and continue to be subjected to segregated schooling as a result of petitioners' constitutional violations.

C. The Court Of Appeals Correctly Held That Test Scores Can Be Relevant In Deciding Whether Deficiencies in Basic Skills Caused By Prior Segregation Have Been Eliminated To The Extent Practicable

1. Petitioners contend (Pet. 45) that the court of appeals has imposed a requirement that student test scores increase to a particular level as a precondition to unitary status. The court of appeals, however, has imposed no such requirement. As the author of the panel opinion explained in voting to deny rehearing en banc,

the decision stands for the more limited proposition that test results should be considered as "one factor" when deciding whether educational deficiencies resulting from prior segregation has been adequately remedied. Pet. App. A48.

That holding is correct. The district court considered test scores in finding that racial segregation had caused lowered achievement. It is logical to consider test scores in deciding whether that violation has been remedied. Test scores could be relevant in a number of ways. For example, proof that test scores improved at first, but then leveled off over time, might suggest that further improvement is impractical. Proof that test scores have risen to the same level as otherwise comparable student populations that have not been exposed to *de jure* segregation might suggest that any remaining educational deficiencies are not attributable to prior segregation. On the other hand, proof that test scores remain substantially below levels achieved by students who have not been subjected to segregation could be a significant indication that the deficiencies caused by prior unlawful racial segregation have not yet been eliminated.

Other evidence might rebut any of these inferences. But that simply proves that test-score evidence should never be viewed as conclusive. It does not show that test scores must be ignored. Here, as elsewhere, "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short their usefulness depends on all of the surrounding facts and circumstances." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 340 (1977).

The court of appeals' holding that outcome measures should be considered, but that they should not be the sole criterion of whether discrimination has been remedied,

is consistent with this Court's decision in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). There, the Court held that the Constitution does not compel any particular level of racial balance in the schools. The Court went on to hold, however, that because a remedial plan must be measured by its effectiveness, numerical objectives can serve as a useful starting point in shaping relief. *Id.* at 24-25. In particular, in places in which there is a history of racial segregation, school boards must show that schools that remain substantially disproportionate in their racial composition are not the product of past or present discrimination on their part. *Id.* at 25-26. A similar approach is appropriate in the context of remedying the impact of segregation on educational achievement. There is no requirement that students must reach a fixed or comparative achievement level before *Milliken II* programs may end. But when segregation has caused impaired educational achievement, evidence that students in the system continue to perform poorly when compared to others can be an important indication that the effects of discrimination persist.

2. Petitioners argue (Pet. 46-47) that because the Constitution requires equal opportunity, not equal results, focusing on student achievement is inappropriate. The question here, however, is not what the Constitution requires as an initial matter. Rather, the question is what the Constitution requires as a remedy once a violation has been proven to have caused impaired educational achievement. When a State violates its duty to provide equal educational opportunity, and that violation results in lowered achievement, the State has an affirmative constitutional responsibility to remedy the consequences of that violation insofar as it practically can. *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S.

526, 537-538 (1979); *Penick*, 443 U.S. at 458-459. That standard does not mean that the State must guarantee equal results. It does mean, however, that the State must make good faith efforts to raise the skill levels of students subjected to segregation to the levels those students would have reached had there been no discrimination. *Milliken II*, 433 U.S. at 280-281. Petitioners appeared to recognize that in 1985 when they urged the district court to institute educational programs "designed to increase student achievement at the elementary and secondary levels." 639 F. Supp. at 25.

3. Finally, petitioners argue (Pet. 48) that any consideration of achievement levels necessarily holds petitioners accountable for factors beyond their control, such as poverty, crime, drug use, and lack of parental involvement. Under the court of appeals' decision, however, petitioners are responsible for continued funding of the *Milliken II* programs only if lingering educational deficiencies are attributable to segregation and only if further progress in eliminating those deficiencies is practical. If petitioners show that the deficiencies that exist today are the product of socio-economic factors unrelated to segregation, they would be entitled to the declaration of partial unitariness that they seek. Similarly, if petitioners show that further steps to address deficiencies in basic skills are unlikely to be successful or that the possible gains are marginal in comparison with their costs, the relief they seek would also be appropriate. Petitioners, however, have not offered evidence to that effect. Their assertion that factors besides segregation are entirely responsible for any continuing educational deficiencies is no substitute for proof.

Sorting out the extent to which poor achievement levels reflect the lingering effects of discrimination and

the extent to which such deficiencies result from other independent causes is not an easy task. That is also true of other inquiries in the school desegregation context. For example, in *Dowell* and *Freeman*, the Court made clear that, notwithstanding the difficulty of the inquiry, a district court must decide to what extent residential segregation is attributable to prior segregation rather than other known causes of that phenomenon, such as economics and private choice. *Dowell*, 498 U.S. at 250 n.2; *Freeman*, 112 S. Ct. at 1447-1448. With the assistance of the parties and the exercise of judgment, courts have the capacity to decide also whether current educational deficiencies have been substantially caused by prior segregation.

The only apparent alternative is to select an arbitrary period of time for the remedy to operate before it is terminated. That approach, however, would in some cases extend the remedy longer than necessary to remedy the effects of segregation, and in other cases halt the remedy before it has accomplished its purpose. The mechanical quality of that course makes it an unsuitable alternative in an area where judgment and sensitivity to factual differences are especially called for. This Court rejected such an approach in *Dowell* and in *Freeman*. It should also reject it here. *Dowell* and *Freeman* have provided an orderly and understandable framework for resolving when school desegregation remedies should be terminated. The Court should not disturb that framework.

CONCLUSION

The court of appeals' judgment with respect to the *Milliken II* programs should be affirmed.

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF MISSOURI, *et al.*,
Petitioners,

vs.

KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR AMICI CURIAE ICELEAN CLARK, ET AL. AND LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of *Amici Curiae*	1
Statement of the Case	2
Summary of Argument	6
Argument	7
I. THE LOWER COURTS' CREATION OF AN OUTCOME-BASED STUDENT PERFORMANCE PREREQUISITE FOR UNITARY STATUS EXCEEDS THE SCOPE OF THE CONSTITUTIONAL VIOLATION UNDER THE EQUAL PROTECTION CLAUSE	8
A. A New Unitary Status Requirement Of Enhanced Student Academic Achievement Would Contravene This Court's Sound *Freeman v. Pitts* Analysis	10
B. The Revenue-Input Premise Implicit In The Lower Courts' New Outcome-Based Student Performance Standard Is Fallacious And Constitutes Judicial Legislation Of Unsound Social Policy	14
Conclusion	18

TABLE OF AUTHORITIES

Page(s)

Cases:

Board of Education v. Dowell, 498 U.S. 237, 111 S.Ct. 630 (1991) 7,9,10

Brown v. Board of Education, 347 U.S. 483 (1954) 8

Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977) 10

Freeman v. Pitts, ___ U.S. ___, 112 S.Ct. 1430 (1992) ..... *passim*

Green v. New Kent County School Board, 391 U.S. 430 (1968) 9,11

Milliken v. Bradley, 418 U.S. 717 (1974) 9

Milliken v. Bradley, 433 U.S. 267 (1977) 3,10

Missouri v. Jenkins, 672 F.Supp. 400 (W.D. Mo. 1987), *aff'd in part and rev'd in part*, 855 F.2d 1295 (8th Cir. 1988), *aff'd*, 495 U.S. 33 (1990) ..... *passim*

Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987) 8

Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976) 10

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 9,12

Constitutional Provisions, Statutes and Rules:

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BRIEF FOR AMICI CURIAE ICELEAN CLARK, ET AL. AND LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

Amici Curiae Icelean Clark, Bobby Anderton, Harry Coulas, Rita E. Vinlove, Kansas City Mantel & Tile Co. and Old Westport Shopping Center are individual and business taxpayers who own property within the Kansas City, Missouri School District ("KCMSD" or "District"). These taxpayers have paid the $1.95 property tax levy imposed in this desegregation case in

1987 by the District Court that was affirmed as modified in *Missouri v. Jenkins*, 672 F.Supp. 400 (W.D. Mo. 1987), *aff'd in part and rev'd in part*, 855 F.2d 1295 (8th Cir. 1988), *aff'd*, 495 U.S. 33 (1990) ("*Jenkins II*"). KCMSD taxpayers, represented by Landmark Legal Foundation, participated as *amici* in that judicial taxation debate before this Court. *See Jenkins II*, 495 U.S. at 54 n.19 & 66. KCMSD taxpayers unsuccessfully challenged the lower courts' subsequent decisions denying full refunds to all taxpayers forced to pay this direct judicial levy and adding another court-approved $0.96 desegregation tax levy for District salary increases. These KCMSD taxpayers desire a resolution of this costly and interminable litigation; they seek return of the control of this school district from judges and lawyers to parents and taxpayers.

Amicus Curiae Landmark Legal Foundation is a non-profit, public interest law foundation headquartered in Kansas City which advocates free markets, limited government, individual rights and the constitutional principles of separated powers and federalism. In addition to representing taxpayers in this desegregation case, Landmark represented minority families and community organizations who challenged the Long Range Magnet Plan's magnet school racial quotas. This opposition ultimately led to the District Court's contingency plan relaxing these quotas which is still in effect today.

Landmark also represents parents and education reform advocates in litigation throughout the country promoting parental choice of schools and parental control of education decisionmaking.

STATEMENT OF THE CASE

In light of the important guidelines announced by this Court in *Freeman v. Pitts*, ___ U.S. ___, 112 S.Ct. 1430 (1992), the State of Missouri Petitioners (the "State") sought from the

District Court[1] a finding of partial unitary status with respect to certain *Milliken II*[2] programs established by the KCMSD, and funded primarily by the State, as a result of the remedial plan ordered by the District Court and the Eighth Circuit Court of Appeals in this unprecedented desegregation litigation. In support, the State presented evidence concerning the costly and unparalleled educational programs already implemented since 1986.

Up to this point, the lower courts had imposed a questionable "suburban comparability" standard when evaluating the educational opportunities established by the desegregation remedy and the State's fulfillment of its desegregation responsibilities. *See Jenkins*, 639 F.Supp. at 54 ("The long term goal of [the District] Court's remedial orders is to make available to all KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district."). This Court's four concurring Justices in *Jenkins II* questioned the Equal Protection Clause basis for a requirement of "interdistrict comparability." They stressed that this new standard should not be considered "a constitutional command." *Jenkins II*, 495 U.S. at 76 (Kennedy, J., concurring in part and concurring in the judgment). These Justices scrutinized the extravagant capital projects and magnet themes established by the KCMSD — but paid for primarily by the State — to meet this standard, concluding there were "strong arguments" against the constitutional validity of the comparability plan. *Id.*, 495 U.S. at 76-77.

In these post-*Freeman* proceedings, the State adduced evidence that these educational programs indeed exceeded *all* comparable suburban opportunities, and Judge Clark acknowl-

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[1] The Honorable Russell G. Clark, Senior United States District Judge for the Western District of Missouri.

[2] *Milliken v. Bradley*, 433 U.S. 267 (1977).

edged the court had "gone to great lengths to provide the KCMSD with facilities and opportunities *not available anywhere else in the country*." (Petition Appendix ("P.A.") A-115 (emphasis added).) Nevertheless, in orders bereft of any legal discussion or factual findings concerning the *Freeman* factors, the District Court denied the State's request for partial unitary relief and mandated additional state funding of more programs.

In extending the District's Long Range Magnet Plan an additional two years (with the same budgetary levels), the court found

> . . . the evidence is clear that there has been a trend of improvement in academic achievement in the KCMSD. However, the Court is not satisfied that the District has reached anywhere close to its *maximum potential* because the District is still at or below national norms at many grade levels. . . . The Court finds that the achievement data provided by the District is reliable but is not probative to the extent which the District used to make its sweeping conclusions as to academic success. Moreover, the Court finds that the studies conducted by the State are reliable but not to the extent necessary to draw the doomsayer's conclusions reached by the State with respect to the success of the magnet program.

(P.A. A-131 - A-132 (emphasis added).)

The Eighth Circuit affirmed the District Court's decision. The panel acknowledged that Judge Clark failed to "articulate explicitly even a conclusory rejection of the State's *Freeman* arguments," but nevertheless concluded he "implicitly rejected" them. (P.A. A-19.) More importantly, the Court of Appeals created a new prerequisite for unitary status: improved (though unspecified) levels of outcome-based student performance. The panel stated:

> The district court correctly observed that implementation of programs in and of itself is not sufficient. The test, after all, is whether the vestiges of segregation, here the system-wide reduction in student achievement, have been eliminated to the greatest extent practicable. The success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation. It will take time to remedy the system-wide reduction in student achievement in the KCMSD schools, and the orders of the district court reflect that it is aware of this fact.

(P.A. A-20 - A-21.)

The full Court of Appeals denied rehearing on a 6-5 vote. In doing so, three judges concurring in the denial argued that those judges who would have granted the *en banc* suggestion based their decision "on a misperception of the issues in this case." (P.A. A-48.) The concurrence contended "[w]hen we deal with student achievement in a quality education program in the context of relieving a school district of court supervision, test results must be considered." (*Id.*)

Judge Beam's sharply worded rehearing dissent confirmed that the "only factor" noted by the District Court as an obstacle to unitary status for the *Milliken II* educational programs was "continued below average academic performance." (P.A. A-61.) There was no other evidence in the record challenging the sufficiency of these programs. As to the question of the KCMSD's partial unitary status, the dissent further declared:

> [T]he standard adopted by the district court and by the panel to evaluate this question misreads *Freeman* and creates a hurdle to the withdrawal of judicial intervention from public education that has no support in the law. The district court, with the approbation of the panel, embedded a student achievement goal measured by annual standardized

tests into its test of whether the KCMSD has built a high quality educational system sufficient to remedy past discrimination. The Constitution requires no such standard.

(P.A. A-58.)

SUMMARY OF ARGUMENT

The lower courts' creation of an outcome-based student achievement prerequisite for unitary status exceeds the scope of the constitutional violation in this case. It expands *Brown*'s "equal educational opportunities" mandate and cannot be countenanced by this Court's recent Equal Protection Clause precedent in *Dowell* and *Freeman*. This new standard would establish an unattainable desegregation goal premised upon failed social policy.

ARGUMENT

This important case does not require the Court to make new law, but apply well-established equitable principles under the Equal Protection Clause of the Fourteenth Amendment, in particular those desegregation guidelines recently set forth in *Freeman v. Pitts*, *supra*, and *Board of Education v. Dowell*, 498 U.S. 237, 111 S.Ct. 630 (1991). The dispositive principle in this case is that the scope of judicial remedies is defined and limited by the scope of the constitutional violation.

The courts' action below, enunciating a new unitary requirement for desegregation defendants that equates "equal educational opportunities" with "equal academic outcomes," is extra-constitutional. This new standard exceeds the scope of the constitutional violation in this matter. It goes far beyond this Court's equal protection precedent and fundamentally misreads the Court's intent in *Freeman*.

In its petition, the State correctly points out that the Court's previous inquiries into school desegregation goals and equal protection injury "have focused upon providing the *opportunity* to obtain a benefit[,] not the ultimate benefit itself." (State of Missouri, et al.'s Petition for Writ of Certiorari at 18 (emphasis in original).) The State rightfully asks the Court to consider the "uncontested opportunity level created in the KCMSD." (*Id.*)

Unquestionably, the Eighth Circuit's creation of a guaranteed academic outcome unitary requirement moves this inquiry beyond the "benefit opportunity" mandate to a judicial assessment of the benefit's performance. The benefit of extravagant and unparalleled educational opportunities clearly is being provided to all KCMSD schoolchildren equally. The problem is this: The benefit — the most intense and costly judicially supervised school desegregation program in the United States — is not producing a desired social objective, improved student performance.

But this more accurately reflects on the legitimacy of the premise underlying the courts' social policies, not on defendants' willingness to provide equal educational opportunities or otherwise rectify past violations of the Equal Protection Clause. The reality of stagnating or declining KCMSD test scores — mirrored in urban districts throughout the country, within the context of desegregation or without — challenges the policy assumption that more financial resources, more government, more judicial mandates will effect improved academic performance and resolve the crises plaguing our urban school systems. This assumption has been no more true for public education than it has been for other government benefit programs intended to reduce poverty, unemployment, homelessness, crime, drug dependency and myriad other social pathologies.

This new outcome-based unitary standard is as dangerous as it is unconstitutional. Acceptance of its underlying premise is guaranteed to produce costly failure and postpone indefinitely resolution of desegregation litigation all across the nation. This ambiguous new standard is a step in the wrong direction. The Court of Appeals' judgment creating it must be reversed.

I. THE LOWER COURTS' CREATION OF AN OUTCOME-BASED STUDENT PERFORMANCE PREREQUISITE FOR UNITARY STATUS EXCEEDS THE SCOPE OF THE CONSTITUTIONAL VIOLATION UNDER THE EQUAL PROTECTION CLAUSE.

The constitutional right at stake in school desegregation cases is "the opportunity of an education . . . available to all on equal terms." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). The vindication of this right throughout an entire school district represents the attainment of "unitary" status — what one court has called "the 'accomplishment' of desegregation." *Morgan v. Nucci*, 831 F.2d 313, 318 (1st Cir. 1987). This Court has

carefully delineated the authority of courts to engage in remedial action in the desegregation context. "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974).

The objective of *Brown* was made more specific in *Green v. New Kent County School Board*, 391 U.S. 430 (1968), where the Court ordered desegregation defendants to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S. at 437-38. To that end, the *Green* Court established several factors measuring racial identifiability to be used for fashioning school remedies and determining "unitary" status, *viz.*, student attendance patterns, faculty, staff, transportation, extracurricular activities and facilities. *Id.*, at 435.

The term "unitary," as defined by the Court, has not been a precise concept. *See Dowell, supra*, 111 S.Ct. at 635-36. Though it lacks a "fixed meaning or content," a court's approach to a determination of "unitary" should not be "inconsistent with the principles that control the exercise of equitable power." *Freeman v. Pitts, supra*, 112 S.Ct. at 1444. School desegregation cases "d[o] not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interest, the condition that offends the Constitution." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971).

However, the exercise of judicial power in performing that balancing is limited by the nature of the constitutional violation. Where desegregation defendants implement in good faith a plan, a court exceeds its remedial authority when it mandates additional responsiblity for unfavorable desegregation results "not attributed to any segregative acts on the part of" those defen-

dants. *See Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 436 (1976). To do so would retard the judiciary's end purpose in desegregation litigation, which is to remedy the violation and restore state and local control to school systems. *Milliken v. Bradley*, 433 U.S. at 280-81. *See Dowell*, 111 S.Ct. at 637 (judicial supervision of local school systems was intended as a "temporary measure"). "[L]ocal autonomy of school districts is a vital national tradition." *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 410 (1977).

The lower courts' creation of a new unitary factor, an ambiguously defined academic performance standard based on test scores, is contrary to this equal protection precedent. It exceeds the "equal opportunity" requirement; it ignores the nature and extent of the District's past segregation; it attributes responsiblity for inadequate desegregation results to parties who have fully complied with the courts' plan by financing the most elaborate school desegregation program in history; and it assures these parties and KCMSD parents and patrons that local autonomy will not be returned in the forseeable future.

A. A New Unitary Status Requirement Of Enhanced Student Academic Achievement Would Contravene This Court's Sound *Freeman v. Pitts* Analysis.

In creating this new unitary factor, the Eighth Circuit panel reasoned thusly: To achieve even partial unitary status and meet *Brown*'s mandate for providing equal educational opportunities, desegregation defendants must eliminate the vestiges of segregation, defined here to mean a system-wide reduction in student achievement. To remove these vestiges, student achievement must increase "to the greatest extent practicable" (P.A. A-21)—or perhaps even to the District Court's vision of "maximum potential." (P.A. A-131.) Consequently, the success of quality of education programs under *Milliken II*, and defendants' compliance with the remedy, can only be measured by these programs' effect on the students. Presumably, this effect will be quantified by standardized test scores.[3]

The panel's reliance on *Freeman v. Pitts* as support for the creation of this new performance outcome standard is misplaced. In *Freeman*, this Court held that, upon a finding that a school system subject to a court-supervised desegregation plan is in compliance in some but not all areas, the federal court may return control to the school system in those areas where compliance has been achieved. 112 S.Ct. at 1445-46. A defendant's good faith compliance with the remedy is a consideration in determining partial unitariness because "with the passage of time the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish, and the practicability and efficacy of various remedies can be evaluated with more precision." *Id.*, at 1446.

The *Freeman* Court acknowledged that the lower courts had "considered an additional factor not named in *Green*: the quality of education being offered to the white and black student populations." *Id.*, at 1437. The parties had considered this factor a "legitimate inquiry" in determining the school district's compliance with the remedy in its allocation of resources. *Id.*, at 1446. The Court saw no "need" to "examine" this aspect of the case "except as it underscore[d] the school district's record of compliance in some areas but not others." *Id.*

It is from this limited recognition of the less-than-rigid framework of *Green*, and the uses of equitable discretion, that the Eighth Circuit molds a new post-*Green* requirement that a desegregation plan's "quality of education" must increase stu-

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[3] With outcome-based education on Missouri's horizon, the role of tests and assessment methodologies in measuring the State's and the KCMSD's compliance with this new standard becomes even more ambiguous. *See* Argument I.B., *infra*, at 17 n.4.

dent academic performance. But this is not what happened in *Freeman*, nor can this new standard be fairly implied from this benign langauage. *Freeman*'s "quality of education" approach was used to evaluate, and ensure, the school district's equal allocation of resources. This concept was used in the service of determining a defendant's compliance with the *Green* factors; it was not an independent factor establishing a new set of desegregation responsibilities.

More importantly, the *Freeman* Court's use of this factor in assessing the allocation of financial inputs among black and white students certainly does not lead to the creation of a unitary requirement assessing the academic outcomes of black and white students. The State of Missouri has allocated substantial resources equally among KCMSD students to establish educational facilities, programs and opportunities "not available anywhere else in the country." (P.A. A-115.) The State satisfies the *Freeman* Court's inquiry on this count.

The Eighth Circuit's attempt to equate "quality of education" with desired academic outcomes resembles the lower courts' attempt in *Freeman* to thwart a partial unitary finding based upon racial balancing. There, this Court declared:

> Racial balance is not to be achieved for its own sake. . . . "[I]n the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary."

Id., at 1447 (quoting in part *Swann, supra*, 402 U.S. at 32). The Court continued:

> Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical

> ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once *de jure* segregated.

Id., at 1448.

Likewise, the Eighth Circuit's desire to visit urban students' academic performance problems on desegregation defendants who have complied with judicial remedies places constitutional implications on conduct that invokes none. There can be no reasonable claim that recent KCMSD student performance has suffered due to a lack, or unequal allocation, of resources or compliance with the remedy. The Equal Protection Clause does not command the achievement of any level of student test scores "for its own sake" any more than it commands a specified level of racial balance.

"The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the *de jure* violation being remedied." *Id.* It is simply not always the case that outside forces "bear any real and substantial relation to a *de jure* violation." *Id.* As we are to see below, the complex external forces that affect student academic performance do not bear a substantial relation to past segregation or efforts to remedy such through the infusion of financial resources into those school districts.

In essence, what the lower courts are saying is this: Irrespective of the racial makeup of the KCMSD — indeed even if the District were to become 60% minority and 40% nonminority — partial unitary status cannot be accomplished so long as student test scores remain below national norms, or perhaps suburban comparability. This unprecedented standard goes far beyond what this Court has said the Equal Protection Clause stands for.

It misinterprets the unitary analysis progress made in *Dowell* and *Freeman*. It is a remedy that cannot be justified as advancing the "ultimate objective of alleviating the initial constitutional violation." *Freeman*, 112 S.Ct. at 1445.

B. The Revenue-Input Premise Implicit In The Lower Courts' New Outcome-Based Student Performance Standard Is Fallacious And Constitutes Judicial Legislation Of Unsound Social Policy.

The nature of the lower courts' orders "reveals that it is not a proper exercise of the judicial power." *Jenkins II*, 495 U.S. at 66 (Kennedy, J., concurring in part and concurring in the judgment). The lower courts' creation of an outcome-based performance standard for unitary status rests on a false premise permeating failed American social policy, that more money and more government solves problems.

The underlying weakness in the Eighth Circuit's outcome-based standard is exposed in a newly released book by the Brookings Institution's Panel on the Economics of Educational Reform. *See* E. Hanushek, et al., *Making Schools Work: Improving Performance and Controlling Costs* (Brookings Institution 1994). In what promises to become the definitive analysis of educational inputs and outputs, more than a dozen economists from across the country converged under the guidance of University of Rochester professor Eric A. Hanushek to review the 187 studies on educational resources. Writing for the *Harvard Journal on Legislation*, Professor Hanushek states the conclusion very directly: "There is no systematic relationship between school expenditures and school performance." E. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 Harv. J. on Legis. 423, 425 (1991). In the United States, real expenditures per pupil have risen steadily over the past two decades. After allowing for inflation, expenditures per pupil more than doubled between 1966 and 1989. During this time period, SAT scores have fallen dramatically and declines

have been registered on a variety of other tests given over this period. *Id.*, at 426.

These conclusions are confirmed in the recent "Report Card on American Education 1994" prepared by the American Legislative Exchange Council. *See Report Card on American Education 1994: A State-By-State Analysis* (American Legislative Exchange Council 1994). This comprehensive evaluation compiles statistical information from federal, state and local agencies as well as testing data and other proof. This year's survey warns: "We must face the facts, and the future, and recognize that there are serious, fundamental problems with our education system today. These problems will not be solved by increasing funding dramatically; that's been tried and, as this study confirms, it doesn't work." *Id.*, at 4. None of the ten top-performing states in terms of student achievement ranked among the top ten in per pupil education spending last year; none of these states ranked among the top ten in average teacher salaries last year. *Id.*, at 7.

The report discloses "a growing consensus that successful schools have three key qualities in common: a belief that all children can learn, and challenge their students academically; local control; and a high degree of parental involvement. These are things that money cannot buy, but that concerned communities can provide." *Id.*, at 3. Of course, that applies to concerned communities that have local control, not judicially supervised education programs.

It is particularly instructive that Professor Hanushek's work with the Brookings Institution's panel of economists involved the assessment of programs and "reforms" similar to the elements at issue in the KCMSD desegregation plan. These included improved facilities, class size and student/teacher ratios, number of advanced teaching degrees, and teacher salaries. "The results are startlingly consistent in finding no strong evidence that teacher-student ratios, teacher education, or teacher

experience have the expected positive effects on student achievement." E. Hanushek, *The Impact of Differential Expenditures on School Performance*, Educational Researcher 45, 47 (May 1989). This validates the independent conclusion that found the KCMSD remedy to be "the most extreme case to dat[e] of using money and educational choice to remedy historical segregation." A. Morantz, *Money, Choice and Equity in Kansas City: Major Investments with Modest Returns* 1 (Harvard Graduate School of Education 1994). The more than one billion dollars poured into the District for this plan has "produced only modest gains in both desegregation and academic achievement." *Id.*

We can take small comfort in the knowledge that this problem is not confined to the Kansas City desegregation case. The Brookings study states that student performance declines have been documented across the country. "School districts commonly labled 'good' — districts with adequate resources, serving relatively advantaged student populations, and free of the pressures of immigrants — have had the same sorts of performance problems as the nation as a whole." *Making Schools Work*, *supra*, at 47. The data reveals that the average minority student consistently performs less well than the typical white student, even though a modest narrowing of the gap has taken place during the past decade and a half. *Id.*, at 40. This conclusion encompasses all minority students irrespective of desegregation efforts.

A most important finding of this recent work points out that school systems — and by extension one could argue federal courts that supervise school systems — are not solely responsible for the scholastic performance of students. These other factors raise serious questions regarding the degree to which governmental institutions can improve educational performance on their own:

> Some aspects of family life and the socioeconomic environment surrounding schools have undoubtedly worsened in recent decades. The composition of families has changed dramatically, with more children living in single-parent families. The incidence of poverty among children, after falling in the 1970s, has risen to the levels of the early 1960s. Persistent welfare support has increased. Schools now compete for students' time and attention with video games, fifty or more television channels, and other attractions.

Id., at 46-47.

The evidence is conclusive. Improving academic achievement and test scores[4] is a complex matter involving multiple factors. The new standard set by the Court of Appeals cannot be attained through factors under the control of the State of Missouri or the District. It is a goal that can never be met solely in the context of this plan. Adoption of this standard will consign students, parents and taxpayers of the KCMSD to indefinite judicial supervision of their school system.

As the concurring Justices in *Jenkins II* stressed:

> [I]t is discrimination, not the ineptitude of educators or the indifference of the public, that is the evil to be remedied. An initial finding of discrimination cannot be used as the basis for a wholesale shift of authority over day-to-day school operations from parents, teachers, and elected officials to

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[4] The lower courts' unspecified level of improvement in students' academic performance appears to be tied to standardized test scores. Missouri's recent adoption of outcome-based education in the "Outstanding Schools Act," Senate Bill 380 (R.S.Mo. 1993), which proposes new performance standards and assessment schemes, will make achievement of this objective even more ambiguous. *See Academic Performance Standards for Missouri Schools: An Interpretive Guide* (Missouri Department of Elementary and Secondary Education, May 1994). The statute itself states: "The assessment system . . . shall not include existing versions of tests approved for use pursuant to the provisions of section 160.257, RSMo, nor enhanced versions of such tests." Section 4.1, Senate Bill 380.

> an unaccountable district judge whose province is law, not education.

495 U.S. at 77 (Kennedy, J., concurring). There was a further warning: "A remedy that uses the quality of education as a lure to attract nonminority students will place the District Court at the center of controversies over educational philosophy that by tradition are left to this Nation's communities." *Id.*, at 76.

These Justices were prescient. With the Eighth Circuit's new outcome-based unitary prerequisite, this judicial controversy over educational philosophy has arrived.

CONCLUSION

The judgment of the Court of Appeals creating an outcome-based student achievement prerequisite for unitary status under the Equal Protection Clause should be reversed.

Respectfully submitted,

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